JAMES R. MURPHEY

IBLA 75-231

Decided May 5, 1975

Appeal from decision of Alaska State Office rejecting final proof for homestead entry A-3776 and canceling claim.

Set aside and remanded.

1. Alaska: Homesteads -- Homesteads (Ordinary): Cultivation -- Homesteads (Ordinary): Final Proof

   Where a homestead claimant submits a final proof which shows on its face that he has not cultivated the full area required, and the record reflects that he has not qualified for military credit or reduction in the cultivation requirements, action rejecting final proof and canceling the claim may be suspended to permit the entryman to apply to purchase not more than five acres under the Homesite Act of May 26, 1934, failing which the proof will be finally rejected and the claim canceled.

APPEARANCES: Randall E. Farleigh, Esq., of Robinson, McCaskey, Frankel and Lekisch, of Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

James R. Murphey has appealed from a decision dated September 24, 1974, of the Alaska State Office, Bureau of Land Management, rejecting his final proof and canceling his homestead claim, filed pursuant to the Homestead Law, 43 U.S.C. §§ 270, 161 et seq. (1970). The Bureau rejected the final proof because it showed on its face a failure to comply with the cultivation requirements of the law and the regulations.

The record shows that appellant filed a notice of location of his homestead claim with the Anchorage Land Office October 10, 1968.

The five-year statutory life of the claim expired October 9, 1973. The entry was subsequently reduced to 90 acres because it conflicted with a native allotment. 1/ Appellant filed his final proof July 13, 1973, which showed that he had cultivated one acre in 1970, one acre in 1971, and 12 acres in 1972. He admitted that no cultivation was accomplished in 1973, the fifth entry year, alleging economic reasons prevented reseeding. He claimed improvements on the homestead which he valued at $5,000. The State Office found appellant's proof defective on its face because he had failed to meet the cultivation requirements set forth under the Homestead Law, 43 U.S.C. § 164 (1970), citing 43 CFR 2567.5(b), which states in pertinent part:

> There must be shown * * * cultivation of one-sixteenth of the area of the claim during the second year of the entry and * * * one-eighth during the third year and until until the submission of proof * * *.

To have satisfactorily complied with these requirements for his 90-acre homestead appellant had to cultivate 5.6 acres his second entry year and 11.25 acres the third, fourth and fifth years until submission of his final proof.

Appellant has admittedly fallen far short of these requirements. However, on appeal he now requests a reduction of his cultivation requirements in the second, third and fourth entry years and claims credit for military service in order to satisfy the requirement of the fifth entry year and one other year.

Appellant's claim for military credit is based on his service in the Marine Corps from December 2 through December 16, 1950. He alleges he is entitled to credit for his service under 43 U.S.C. § 279 (1970), by reason of his discharge on account of "wounds received or disability incurred" while he was in boot camp in the United States Marine Corps.

From our review of the record we have determined there is no validity to appellant's claim for military credit. The regulations in 43 CFR 2096.1-1, pursuant to the Act of September 27, 1944, 43 U.S.C. § 279 (1970), provide:

> (a) A veteran is entitled to benefits under the 1944 act if he has served in the military or

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1/ The Bureau's records showed that Vivian E. Grey Bear had filed a native allotment application claiming occupancy of a portion of Murphey's entry from 1963. By decision of March 31, 1972, Murphey's entry was allowed in part for 90 acres.

naval forces of the United States including the Coast Guard on or after September 16, 1940, and prior to the termination of the Korean Conflict, referred to in this part as the "statutory period" of the 1944 act, and has been honorably discharged from such forces.

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* * * In addition, the veteran must have:

(1) Served at least 90 days during the statutory period, or
(2) Been discharged on account of wounds received or disability incurred during the statutory period in line of duty, or * * *

Appellant has submitted copies of his military and medical records to substantiate his claim of disability. Although he alleges a disabling injury to his leg during his 14-day service at Marine boot camp, the record only shows that he suffered from a known pre-existing condition. Reports of medical examinations both before and after appellant's enlistment in the service refer to a disfigurement of the right thigh due to an extensive burn which he suffered at age 13 years. It was known prior to his enlistment that this burn had previously resulted in recurring bouts of pain in the right knee. Yet, the medical examination conducted December 7, 1950, at Parris Island, South Carolina, which resulted in appellant's return to inactive duty, revealed no new injury or damage to the leg. In describing appellant's condition at that time the examining doctor noted "no swelling or limitation of motion of the knee." It is clear from these records that the unusual circumstances of appellant's physical condition prior to his enlistment was the reason for his release. Appellant did not incur a disability during his active duty as contemplated by the law and the regulations. Accordingly, a discharge was issued "for the convenience of the government" without any notation of a disability. For this reason, appellant's military service does not qualify to satisfy the cultivation requirements. 2/

2/ The BLM State Office held that appellant's military service did not satisfy the cultivation requirement for a different reason. The decision states:

"Mr. Murphey, via his attorney, claims that at boot camp in the fall of 1950 he injured his leg and was 'honorably discharged, waiving any claim to a service-connected injury.' Since Mr. Murphey waiving any claim to a service-connected injury and does not have 7 months military service, the fifth year cultivation requirement was not satisfied by his military service."

Appellant's attorney now states "There appears to be nothing

Appellant cites the misfortunes of his mother's illness in the second entry year and the unforeseen failure of hired equipment in the third entry year as reasons for his failure to meet the cultivation requirements in those years. He now seeks reduction in cultivation during these periods of misfortune under 43 CFR 2511.4-3(b)(2). Upon notification to the manager of the land office within 60 days of a misfortune, the regulation allows a reduction when misfortune renders the entryman reasonably unable to cultivate the prescribed area, but such reduction applies only to the period of disability.

Although appellant was notified of the provision for reduction of cultivation and was requested to submit required information by letter of July 19, 1971, he never applied for a reduction or supplied any information as to his circumstances. Even, arguendo, allowing a reduction for these two entry years, the reduction would be of no avail in the fifth entry year where he performed no cultivation. We are still confronted with this fatal defect in his proof since he cannot avail himself of his limited military service.

On these facts the final proof was properly rejected and the entry canceled where the final proof showed on its face that the entryman did not comply with the cultivation requirements of the law, and a reduction in the requirement is not warranted. Lon Philpott, 13 IBLA 332 (1973); Ronald E. Hurst, 8 IBLA 1 (1972); Lois A. Mayer, 7 IBLA 127 (1972).

However, it appears appellant may qualify for a homesite under the Act of May 26, 1934, 43 U.S.C. § 687a-1 (1970), based on the work he has done to date on his entry. 3/ In similar circumstances this Board has recommended that the entryman be allowed to verify

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fn. 2 (continued)
in the military and medical records supplied by the General Services Administration to indicate a specific waiver to military incurred injuries." Although the original basis for rejecting appellant's military service has changed the result is the same for reasons cited herein.

3/ The homesite law requires that the applicant have a habitable house on the land, as does the homestead law, and that he reside there for not less than five months each year for three years, which is less than the minimum residence required of the entryman of an ordinary homestead. Accordingly, compliance with the habitation and residence requirements of the homestead law will also qualify the settler under the homesite law. In contrast to the homestead or trade and manufacturing site laws, qualification under the homesite law involves no cultivation or commercial activity.

his compliance with the Homesite Act. In order to avoid the severe hardship which might result from an unqualified affirmation of the decision below, appellant will be afforded an opportunity to file an application to purpose a homesite of not more than five acres embracing his principal improvements. Lon Philpott, supra. The Alaska State Office will fix a date certain by which appellant must take the appropriate action, and will so notify the appellant. Action rejecting the homestead final proof will be suspended in the interim. See Robert W. Blondeau, 1 IBLA 8 (1970). Appellant is urged to consult the proper Bureau officers for a clear understanding of what must be done within the allotted time to avoid final cancellation of the claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals of the Secretary of the Interior, 43 CFR 4.1, the decision appeals to whom is set aside and the case is remanded for further action consistent with this decision.

Martin Ritvo
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge